Supreme Court, U. S.
FILED
SEP 6 1977
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5221

George Washington Miller,

Petitioner

-vs-

The State of Ohio,

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATION TO OPINION BELOW

The opinion of the Ohio Supreme Court is reported at 49 Ohio St. 2d 198 (1977).

JURISDICTION

Respondent does not have any question as regards the statement of jurisdiction as set forth in the Petition for writ of certiorari.

QUESTIONS PRESENTED

Respondent has no dispute with the questions as presented in petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no authorities in addition to those of petitioner.

STATEMENT

At this time respondent has no material dispute with the petitioner's statement of the case, except that evidence which materially affects this Court's consideration of the first question, which testimony will be presented with the applicable rules of law.

ARGUMENT

I.

REVIEWING AND DETERMINING THE WEIGHT OF THE EVIDENCE IS NOT A UNITED STATES CONSTITIONAL QUESTION FOR WHICH CERTIORARI SHOULD BE GRANTED.

Petitioner correctly notes that in the instant case the Ohio Supreme Court correctly applied Ohio law to the issue of the sufficiency of the incriminating evidence; a rule of law in accord with the Ohio Constitution and derived from Ohio case law, not from the Constitution of the United States. The federal courts are in agreement that the Ohio rule which requires that before fingerprint evidence may be used to support a conviction, such circumstantial evidence must

exclude every other reasonable hypothesis except that of the defendant's guilt is not beyond the scope of permissible state dictates of proof sufficient to satisfy the requirements of due process.

In Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950) reh. denied, 340 U.S. 898 (1950), the court declared:

> The testimony of the fingerprint expert was sufficient to go to the jury if its nature was such that reasonable minds could differ as to whether inferences other than guilt could be drawn from it. It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of fact. at 393.

The Court of Appeals, Second Circuit has also unequivocally repudiated the view that as a constitutionally necessitated standard, circumstantial evidence is probatively inferior to direct evidence and that its sufficiency is, therefore, to be determined by a different, more strigent test, than the test required of direct proof.[1]

This Court has consistently declined to consider cases that have applied a more liberal evidentiary standard:[2]

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[1]United States v. Brown, 236 F.2d 403, 405 (2nd Cir. 1956), United States v. Becker, 62 F.2d 1008 (2nd Cir. 1933).

[2]Stopelli v. United States, supra; United States v. Valenti, 134 F.2d 362 (2nd Cir. 1943), cert. denied 319 U.S. 761 (1943); United States v. Manton, 107 F.2d 834 (2nd Cir. 1938), cert. denied 309 U.S. 664 (1939); United States v. Darsart Sportswear Inc., 169 F.2d 856 (2nd Cir. 1948) cert. denied sub nom, Deeb v. United States, 335 U.S. 884 (1948).

The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, ..., but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. Holland v. United States, 348 U.S. 121, 140-141 (1954).

The Court has additionally remarked that a denial of certiorari is, in some cases, a significant indication of the Court's attitude about certain questions, United States v. Kras, 409 U.S. 434, 433 (1973), See also Willie Lee Richmond v. Arizona, -U.S.-, (Opinion of Mr. Justice Rehnquist as Circuit Justice, 9th Cir. August 8, 1977). However, more than mere inferences are available as to this Court's position on the sufficiency of circumstantial evidence. The court in Stoppelli v. United States found significant this Court's statement that:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.[3]

In Pierce v. United States, 252 U.S. 239, at 251-52 (1919) this Court declared that:

> The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

Petitioner does not contravene any of the above cited case law, but rather asks this Court to become a trier of fact, a task rejected by the opinion in Stoppelli v. United States, supra.

The Supreme Court of Ohio has ruled, after reviewing the evidence, that petitioner was properly convicted by proof beyond a reasonable doubt. Petitioner has not shown that the present Ohio evidentiary rule need be changed to satisfy the requirements of the due process clause of the

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[3]Tennant v. Peoria & P.U. Ry.Co., 321 U.S. 29, 35 (1943).

Fourteenth Amendment of the Constitution of the United States. Therefore, it is respectfully submitted that it would be inappropriate for the Court to grant certiorari on the basis of this state issue.

Petitioner, in addition, would have this Court believe that there was virtually no evidence against the petitioner other than his fingerprints (petitioner's brief, 9). This is not so. Bloody footprints were found around the body of the deceased (App. p.16, 17) which matched a pair of discarded tennis shoes found on a roof of a neighboring store (App. p.18). When he was arrested the petitioner was wearing a brand new pair of shoes of a kind carried by the store where the murder took place (App.19). The implication of this evidence is more fully shown when it is also known that in the shoe department of the store there was a rack capable of holding four pairs of men's shoes. Three pairs of shoes were found on the floor with the white plastic tags holding the shoes, as pairs, together, cut (App. p.19,20). The sizes of the remaining shoes were men's eight, nine, and ten (App. p.20). The shoes petitioner was wearing when arrested matched those still in the store as being of the same make; made in the same country, Spain; were of the same materials; and had the same manufacturer's identification number (App. p.21, 22, 23).

The petitioner testified that he had worn these shoes when he walked down a railroad tracks to work notwithstanding the fact that they were clean and showed no evidence of having been worn under such conditions as would be commonly found there, e.g., the ashes and creosote (App. p. 24, 25).

Also, the last time he was in the store where the murder took place, petitioner testified that he only handled the screws that were on display, not the hacksaw blades where his fingerprints were found (App. p.26). Petitioner also denied the correctness of the information the store manager had about his being employed the same hours of the victim, hours sufficient to know the victim's habits (App. p.27, 28).

The petitioner also presented an alibi and witnesses to support the alibi. Based on the verdict, the jury obviously did not believe the petitioner's assertions of being elsewhere when this crime was committed. The only other evidence of where he could have been was at the scene of the crime.

The petitioner is asking this Court to review the evidence in this case and determine its sufficiency. Such a task is not of constitutional proportions.

II.

The respondent would agree that the determination of the constitutionality of the Ohio death penalty statutes in this case will be governed by Bill v. Ohio, 48 Ohio St. 2d 270 (1976), cert. granted -U.S.- 96 S.ct. 2971 (1977).

However, respondent would not agree with the petitioner that the instant case presents questions of constitutional dimension that will not be addressed by this Court in Bell v. Ohio, supra. The three additional questions presented by petitioner vary from those in Bell v. Ohio, supra, only in phrasing of the issues and not as to significant constitutional law.

Respondent would respectfully urge this Court to not grant a writ of certiorari, because of these issues, because once Bell v. Ohio, supra, is decided, these questions will be moot.

III.

THE OHIO DEATH PENALTY STATUTES DO NOT VIOLATE EITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE STATUTORY SECTIONS RELEVANT TO SENTENCING DO PERMIT PARTICULARIZED REVIEW OF THE OFFENDER AND THE CIRCUMSTANCES SURROUNDING THE CRIME.

The petitioner would object to the fact that the Ohio death penalty, sentencing, statutes[4] do not require the prosecutor to reprove the facts of the crime at the penalty stage of the proceedings. (Petitioner's brief, page 25). Section 2929.03 (C) Ohio Revised Code provides that the sentencing portion of the bifurcated proceeding be conducted and sentence pronounced by either the judge who tried the offender, when trial by jury is had, or by the same three judge panel that tried the offender when he waives trial by jury and is tried to the court.

Section 2929.03 (D) Ohio Revised Code, requires that a pre-sentence investigation be made and that a psychiatric examination of the offender be conducted; both reports are to be made to the court, with copies to the parties.

In considering whether or not mitigating circumstances exist, the court must consider "the nature and circumstances of the offense and the history, character, and condition of the offender."[5] Thus, the sentencing judge must focus on the

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[4]Ohio Revised Code Sections 2929.03 and 2929.04.

[5]Ohio Revised Code Section 2929.04 (B).

individual circumstances of each crime and each offender, overcoming the constitutional deficiences declared in Furman v. Georgia, 408 U.S. 238 (1972) that the death penalty could no longer be imposed in an arbitrary and capricious manner.

Judges, being more experienced in sentencing procedures, are better able to impose consistent sentences, Proffitt v. Florida, -U.S.-, 96 S.Ct. 2960, 2966 (1976). Analogous to this statement, and one which must be read in pari material with it, is that of Mr. Justice Rehnquist in Woodson v. North Carolina, -U.S.-, 96 S.Ct. 2978 (1976) (dissent), citing McGautha v. California, 402 U.S. 183 (1971):

> "The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalogue the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever really be complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need. 402 U.S., at 207-208 (citation omitted)" -U.S.-, 96 S.Ct. at 2999.

If judges are more qualified to sentence, then the rationality which states can attribute to juries who sentence can also be applied to judges.

The three judge panel in this case had heard all of the evidence, as to the merits, for and against the petitioner, prior to sentencing, they had already, themselves, found beyond

a reasonable doubt that the petitioner was guilty of the homocide and aggravating circumstances, what petitioner is asking is that the three judges should have told, by statute to set aside their previous verdict of guilt and hear the evidence anew to determine if there was any doubt in their minds.

The petitioner's argument would be more valid if the petitioner had been tried by a jury and sentenced by the court. In such a situation the judge could review for himself the weight of the evidence and give the weight he thought proper to any feelings he might that the verdict was not the proper one.

Gregg v. Georgia, -U.S.-, 96 S.Ct. 2909 (1976) does not constitutionally mandate a reargument of the merits of the case during the sentencing portion of the trial, contrary to the petitioner's citation. The portion of Mr. Justice White's opinion he cites, the respondent interprets as merely explaining the Georgia procedure.

The Ohio Supreme Court has also stated that all relevant factors are to be taken into consideration by the three judge panel or single judge when sentencing, State v. Bell, 48 Ohio St. 2d at 281, 282.

Therefore, as applied to petitioner and upon its face, the sentencing procedures in the Ohio capital punishment statutes are constitutionally valid.

IV.

THE OHIO DEATH PENALTY SCHEME IS NOT UNCONSTITUTIONAL, AS IT ALLOWS THE SENTENCING AUTHORITY TO REVIEW ALL RELEVANT EVIDENCE, BOTH IN MITIGATION OF THE DEATH PENALTY AND EVIDENCE IN FAVOR OF THE DEATH PENALTY, CONCERNING THE OFFENDER AND THE CRIME.

Petitioner first attacks the Ohio death penalty scheme as being unconstitutional on its face. Such an analysis does not withstand scrutiney in light of Jurek v. Texas, -U.S.-, 96 S.Ct. 2950 (1976), finding constitutional the Texas death penalty statutes.

Respondent would concede that Gregg v. Georgia, supra, and the cases decided subsequent to that case, all require that before a death penalty sentence can be constitutional, under the Eighth and Fourteenth Amendments of the Constitution of the United States, the sentencing authority must be allowed to focus on "'the circumstances of the offense together with the character and propensities of the offender,' Pennsylvania v. Ashe, 302 U.S. 51, 55" Gregg v. Georgia, -U.S.-, 96 S.Ct. at 2933.

This Court found the Texas statutory system constitutionally valid because, first, there had to be an aggravating circumstance found to exist by proof beyond a reasonable doubt; and, secondly, the jury had to answer three questions concerning the offender and his crime. When these two factors were taken together, they "guide[d] and focuse[d] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." -U.S.-, 96 S.Ct. at 2957.

The Court, in Jurek v. Texas, supra, at 96 S.Ct. 2956 found that it was bound by the Texas Court of Criminal Appeals

interpretation of the mitigating factors. The Ohio Supreme Court has, as has the Texas court, determined to interpret broadly the evidence a defendant shall be allowed to put on in mitigation.

> The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. State v. Woods (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense is a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. Williams v. New York (1949). 337 U.S. 241, 247.
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> * * * *
>
> However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty *** is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender" (emphasis added [by court]), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.
>
> State v. Bell, 48 Ohio St. 2d, at 281.

This broad interpretation of the evidence allowed to be presented by the offender negates the petitioner's concern that the Ohio statutes are too narrowly drafted.

Petitioner secondly attacks Section 2929.04 (B)(3) Ohio Revised Code as being too narrow to permit individualized consideration of his mental status. This section provides:

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. Ohio Revised Code Section 2929.04 (B)(3).

In construing the above subsection, the Ohio Supreme Court in State v. Bell, supra, at 282, held that considering the pre-sentence investigation by the probation department, psychiatrists, psychologists, and school authorities, which reports focused on the Bell's home life, his involvement with drugs, his inability to perform in school, and his age, there was insufficient evidence to establish mental deficiency. Even though the Ohio court rejected Bell's claim of mitigation, the courts of Ohio did take a broad range of factors into consideration before determining the sentence to be imposed, or affirmed.

The Ohio Supreme Court in State v. Black, 48 Ohio St. 2d 262 (1976), construed the phrase "psychosis" insufficient to establish the defense of insanity in the broadest terms possible. It said:

> It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, broadly defined and however evidenced, any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself so that it may be determined whether the condition found to have existed was the primary producing cause of the offense. To define terms such as those used in the statute is to narrow them.

> It has often been charged that our definition of legal insanity is too narrowly defined. For the appellant to claim that the mental state for purposes of the mitigation hearing also needs to be so defined, is to bind the conscience of the trial court initially, and of the appellate court and this court on review. The language used has a saving grace, for it will permit the examination of the mental state of the offender, whether juvenile, adolescent or adult, in light of the offense, the offender, and all of the circumstances of the crime, for the purpose of reaching a decision on humane grounds as to whether society needs to exact the ultimate penalty. at 268.

The petitioner cites State v. Bayless, 48 Ohio St. 2d 73, 96 (1976) for the proposition that the Ohio Supreme Court has adopted a narrow construction of the third mitigating factor. The psychiatric experts at the Bayless trial testified that Bayless was not psychotic, and was of normal or dull normal intelligence, but was not mentally limited so as to be retarded. They also testified that he was emotionally and culturally deprived, as well as being subnormal in his emotional control and conscience, State v. Bayless, supra at 94. It was this low-average person that the court said did not qualify as being mentally deficient or psychotic, short of insanity.

Additionally, petitioner's citation of Ohio cases not involved with the death penalty statutes is not on-point. State v. Henley, 15 Ohio St. 2d 86 (1968) questions the use of hearsay in the report of the psychiatric expert. State v. Jackson, 32 Ohio St. 2d 203 (1972), as far as the insanity issue is concerned, deals with the weight of the evidence the offender must (at that time) bear to prove the defense.

Finally, Fortune v. Reshetylo, 33 Ohio St. 2d 22 (1973), dealt with a defendant found to be insane at the time of trial and therefore unable to stand trial until sane. The issue decided was whether or not upon being found to have returned to sanity sufficient to stand trial and being found at trial not guilty by reason of insanity, was the defendant to be returned to the state hospital, as mandated by statute, to be re-examined prior to final release.

Petitioner's reading of the statute ignores the plain meaning of its wording, "insufficient to establish the defense of insanity." Based on the construction given this statute in Black, supra, respondent would assert that like Bayless, the petitioner did not show that he was psychotic or mentally deficient.

Finally, this same issue is presently before this Court in Bell v. Ohio, supra, and the Court's determination therein will be binding on this case.

C O N C L U S I O N

For the reasons more fully set forth hereinabove, a writ of certiorari should not be granted in the instant case.

Respectfully submitted,

James A. Berry
Clark County Prosecuting Attorney

PROOF OF SERVICE

I, James A. Berry, Prosecuting Attorney for Clark County, Ohio, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 1st day of September, 1977, I served copies of the foregoing Response in Opposition to Petition for Writ of Certiorari on Latham & Watkins, Max L. Gillam, 555 South Flower Street, Los Angeles, California 90071, Action, Dunn & Busch, Thomas H. Busch, First National Bank Building, Springfield, Ohio 45502, attorneys for petitioner, by mailing copies in duly addressed envelopes, with first class U.S. postage.

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A P P E N D I X

Note: The Appendix was not photographically reproducible.